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No. 1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections

Petitioner,

vs.

WILLIE JASPER DARDEN

Respondent.

On Petition for Writ of
Certiorari to the United
States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER (RULE 22.6)

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QUESTIONS PRESENTED

TO WHAT EXTENT DOES THE PRESUMPTION OF CORRECTNESS DOCTRINE CONTEMPLATED IN 28 U.S.C. §2254(d) APPLY TO A DETERMINATION THAT A JUROR WAS PROPERLY EXCUSED FOR CAUSE UNDER WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)?

IRRESPECTIVE OF ANY SUCH STATUTORY APPLICATION, DID THE COURT OF APPEALS NEVERTHELESS DECIDE THE WITHERSPOON ISSUE IN A WAY IN CONFLICT WITH THE DECISIONS OF THIS COURT?

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SUPPLEMENTAL REASON FOR GRANTING THE WRIT

A recent and relevant example of an additional application of 28 U.S.C. §2254(d) is found in Patterson v. Cuyler, 729 F.2d 925 (3d Cir. 1984). At issue there was the voluntariness of a criminal defendant's waiver of his right to remain silent. The state courts rejected the defendant's argument that he did not knowingly, intelligently and voluntarily waive that right and concluded that the waiver was valid, and the confession voluntary. In determining that this finding was entitled to a complete presumption of correctness under 28 U.S.C. 2254(d), the Third Circuit Court of Appeals concluded that two of its earlier decisions were wrong in holding that the voluntariness of a confession is a mixed question of law and fact to which the

presumption of §2254(d) does not apply. This conclusion was based upon interpretation of this Court's recent decisions discussing the requirement of Sumner v. Mata, 449 U.S. 539 (1981), in Maggio v. Fulford, ___U.S.___, 103 S.Ct. 2261 (1983); Marshall v. Longberger, ___U.S. ___, 103 S.Ct. 843 (1983); and Rushen v. Spain, ___U.S.___, 104 S.Ct. 453 (1983).

Since the issues in each of these three recent cases may be characterized as mixed questions of law and fact and since §2254(d) in each case was applied over the dissenting view that it was inapplicable, the court of appeals was lead to the inescapable conclusion that its earlier statements that mixed questions of law and fact are not governed by §2254(d) were no longer accurate.

Presumably, had the issue involved a Witherspoon excusal, the Third Circuit

would have acted directly contrary to the Eleventh Circuit and applied the presumption of correctness doctrine in §2254(d) in the absence of convincing evidence to the contrary.

A recent and relevant example of yet an additional and wholly inconsistent application of 28 U.S.C. §2254(d) is found in Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984). Deciding this case less than one month after the en banc decision sought to be reviewed, the Eleventh Circuit considered a Witherspoon issue in a Georgia capital case. Responding to the contention that a prospective juror was improperly excused, the court quoted the pertinent exchanges and issued the following pronouncement:

> The trial judge had the opportunity to notice whether the statement was in fact so uttered and concluded that it was. His findings of fact as

> to a juror's impartiality, in light of the Witherspoon criteria, are presumptively correct. 28 U.S.C. §2254(d) (1976); Sumner v. Mata, 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981). 728 F.2d at 1338.

That this holding is at the very least remarkable, one need only realize that the standard of review supposedly established by the en banc court in Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984), was completely ignored.

Also, two other obvious inconsistencies are at once seen. The first is the clear holding that Witherspoon exclusions are apparently no longer mixed questions of law and fact but questions of fact alone. Second, since they are now matters of fact, they are presumptively correct under §2254(d).

Based on the above, it is thus seen that 28 U.S.C. §2254(d) continues and, we submit, will continue to be the

basis of inconsistent decisions regarding its application by the federal appellate courts. What could be better evidence of that fact than the clear contradictions within the Eleventh Circuit itself?

Respectfully submitted on this _____day of May, 1984.

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